BOARD OF ALIN LABOR CERTIFICATION APPEALS
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: August 29, 2000

CASE NO: 2000-INA-229
In the Matter of:

ESTRELLA PRIMICIAS, M.D.
Employer,

On Behalf of:

RIANO ADELA
Alien

Certifying Officer; Dolores DeHaan
New York, New York

Appearance: Steven Elias, Esq.
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Adela Riano ("Alien") filed by Employer Estrella Primicias ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, New York denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On January 13, 1997, the Employer filed an application for labor certification to enable the Alien, to fill the position of Cook, in her private household in Ogdensburg, New York. The duties of the job offered were described as follows:

> "Will cook meals on a daily basis, particularly Chinese and Filipino foods, and on occasion for parties and business entertainment. Prepare daily menu in consultation with the employer and purchase necessary ingredients. Will clean the kitchen and utensils."

Six years education and two years experience in the job were required.

In a letter dated May 14, 1998 directed to the New York State Department of Labor, Employer stated that in response to their letter of April 2, 1998, Employer had amended the salary to $347.60 per week. Employer forwarded information in this letter such as: that her hours generally as Clinical Director of the St. Lawrence Psychiatric Center was from 8:00 a.m. to 4:00 p.m., but that 3 or 4 times per week she worked until 7:30 p.m.; that she lived on the hospital compound having been widowed for three years; that she often needed to lunch with her nurse and secretary; that she feared shopping at night and that preparation of food for herself and her friends and relatives has become an increasingly more difficult chore. Employer reiterated her desire to have a cook that is proficient in preparing Chinese and Filipino food. She enclosed a list of guests and activities as she could best reconstruct it from May

1997 through April, 1998. Her intention was to employ a full time cook on a daily basis and when special occasions arise.

On July 14, 1999, the CO issued an NOF. It first noted that the listed telephone number on the ETA belonged to the St. Lawrence Pyschiatric Center; "There is no telephone listing for employer". Labor certification was proposed to be denied since the job opportunity was not clearly open to U.S. workers and was nor demonstrated to be a *bona fide* full-time job. The CO required documentation of twelve specific facts such as: number of meals prepared per day and week; number of children, if any; frequency of entertaining; whether the household had previously employed a domestic cook; percentage of disposable income to be used by employer for payment to the cook; relationship, if any, to Employer of alien. Secondly, the CO required documentation that the requirement of ethnic cooking was a business necessity, or deleting the requirement. Thirdly, the job was described as a cook which could be live-out, but the opportunity was treated as a live-in requirement since alien lived on the premises. The CO further required a copy of the employment contract which must contain specific documentation of ten items suggested by the CO. Additionally, documentation of alien's past work history needed to be forwarded.

On August 2, 1999, Employer forwarded a rebuttal consisting of specific answers to each of the twelve questions concerning the *bona fides* of the job opportunity, which included: tax returns; schedule of entertainment functions and number of persons entertained from February, 1996 through January, 1997. Employer stated that alien was no longer living at her household, but had moved back to California. Employer would be paying alien approximately 18% of her income. She wished to delete the ethnic cooking requirement and readvertise.

On January 10, 2000 the CO issued its Final Determination denying certification. The CO noted that Employer had successfully rebutted parts of the NOF, specifically 20 CFR 656.21(b)(2), (b)(2)(i) and (a)(3)(ii). However, she found that Employer had not rebutted that the job opportunity was open to all U.S. workers in that Employer hadn't demonstrated it was a *bona fide* offer. She stated (uncorrected):

"Employer's rebuttal information indicates that the Domestic Cook is only responsible for preparing lunch and dinner on a daily basis. Lunch is prepared for 3 people, the employer, her secretary and nurse. Dinner is prepare for the employer and any invited guests. Employer states, on the weekends her family visits and normally has either lunch or dinner. The Domestic Cook

is responsible preparing these weekend meals and will be compensated at an over-time rate of pay or be given an alternate day off.

"Employer states that her daily work schedule is from 8:00 am-4:00 pm and 3 or 4 times per week, she works as late as 7:30 pm. The Domestic Cooks work schedule is from 11:00 am-7:00 pm.

"The entertainment schedule submitted by the employer indicates that the employer entertains, family members, approximately once a month. With the exception of July and August, when the employer's daughter-in-law and grandchildren visit more often and stay 2-3 days at a time.

"Employer's daily work schedule and annual entertainment schedule submitted do not warrant the services of a full-time Domestic Cook."

On June 16, 2000 Employer appealed the CO's Final Determination. Employer contended that: "In examination of all the duties described on item #13 of ETA 750A, including the purchasing of ingredients to cook the food, it was unreasonable for the Certifying Officer to determine that these duties do not warrant full time employment." Secondly, Employer took issue with the CO's reference to Employer attempting to qualify alien under the "skilled" worker rather than "unskilled" since the pace of certification in the unskilled category is increasing while this case has assumed a longevity on its own.

DISCUSSION

We affirm the CO on the basis that Employer failed to document that the job offer was *bona fide*. In Carlos Uy III, 1997-INA-304 (March 3, 1999)(en banc), the Board enunciated the "totality of circumstances" test under 20 CFR 656.20(C)(8) and set forth the criteria to be applied in domestic cook cases. See, also, Enrique and Adriane Viano, 1998-INA-0004 (May 25, 1999). Although we would have wished that the CO had been more specific in explaining in her Final Determination why the job offer was not *bona fide*, we note several facts that would support the CO's position.

Employer stated that the percentage of disposable income requested by the CO that would be required to pay for the position of Domestic Cook would be approximately 18%. This figure, however, is derived from Employer's gross salary and not disposal income which is substantially less after taxes as reflected on her income tax returns. Real Estate losses might

indicate even further expenses that might additionally reduce disposable income, although the form explaining these losses was not included in the rebuttal evidence. Additionally, the payments to the cook do not include overtime, which according to Employer's weekend entertainment allegations would be substantial. While a budgeting of 18% of disposable income might be considered reasonable enough to not exclude a *bona fide* job opportunity, payment approaching or exceeding 25% would appear generous to the point of demonstrating a lack of a *bona fide* full-time job offer.

Similarly, Employer's explanation that lunch very often includes Employer's nurse and secretary does not appear to comport with reality. Employer has stated that she lives on the hospital compound, but not why she would take time from her work chores to prepare meals for them. Presumably a hospital compound has many available eating places such as cafeterias. Interestingly, also, Employer's original advertisement gave hours of employment commencing at 12:00 noon, which would make lunch preparation difficult if not impossible within normal times of eating. While full-time employment is not the sole factor under which to evaluate an application, it is a circumstance to be considered. Jack Jenkinson, 2000-INA-54 (April 3, 2000); Uy, *supra*.

Further, Employer's entertainment schedule as pointed out by the CO is not extensive, particularly as it relates to entertainment of business clients. Rather, most of the entertainment is on weekends for family members. Unexplained is why the three apparently grown children with families cannot assist in the preparation of meals on these occasions.

ORDER

The Certifying Officer's Denial of Certification is Affirmed.

For the Panel

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.